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No. 03 - 103

IN THE

SUPREME COURT OF THE UNITED STATES

BERMAN J. WATTS JR.,

Petitioner,
vs.

LES BROWNLEE, ACTING SECRETARY of the ARMY; DEPARTMENT OF THE ARMY, Headquarters United States Army Aviation Center and Ft. Rucker,
Respondent.

PETITIONER'S REPLY BRIEF TO FEDERAL RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Berman J. Watts, Jr.
P.O. Box 82202
Atlanta, Georgia
30354
(404) 622-3195

Petitioner Pro Se

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QUESTIONS PRESENTED

I. Whether employment discrimination involving age includes disparate impact and, proof of disparate treatment as in Title VII race and other employment discrimination?

II. Whether demonstration of a prima facie case of hiring employment discrimination by the *McDonnell Douglass* framework for discrimination may be limited to the form for post hiring disparate treatment when the hiring framework otherwise demonstrates such discrimination but the post hiring form can be construed not to.

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OPINIONS BELOW

The Eleventh Circuit's opinion has not been reported (Pet.App. 1a-8a). The applicable District court opinion is also unreported (Pet. App. Exs.3-4).

JURISDICTION

On appeal, invoking Title 28 §§1291,1292 jurisdiction, the Eleventh Circuit issued an order dismissing the appeal on November 12 , 2003. Timely Petition for Rehearing and Suggestion for Rehearing en banc were filed and, subsequently denied on February18, 2003.

The jurisdiction of this court to review the lower court was invoked under 28 U.S.C. §1254 (1).

STATEMENT

This case results from the Eleventh Circuit Court of Appeals affirmation of a district court adoption of a Magistrates Report and Recommendation for a summary judgment order in an employment discrimination case based on race, retaliation and age. Although other aerospace engineer jobs advertised nationally as not requiring "helicopter pilot in command" experience were listed, Defendant Respondent Army (Ft. Rucker Army Aviation Center/ Test Organizations and Directorate of Combat Developments), provided announcement and application for, and claimed only a job requiring "helicopter pilot in

command" experience existed upon request. Subsequent inquiry via Petitioner's Congressional Representative resulted in the Army's reiteration of such claim in writing although concurrently other such positions were being advertised in media not yet then cited and, subsequently roughly a dozen such positions were filled not requiring such "helicopter pilot in command " experience. "Official" listings were after the fact assertion(s) involving the single helicopter pilot experience requirement aerospace engineer's job by the personnel officer and his successor (who was not present at such time) rather than the documentation required by respondent's own regulations for the register of jobs at such period- despite repeated discovery requests and motion to compel discovery prior to summary judgment. Respondent also contradicted itself in justifying the automatic distribution of application for subsequent such jobs as not being provided ever and subsequently as being provided on request. (Summary Judgment Motion response to Opposition, . R2-55-15,.)

Action was brought in the initial district court pursuant to Title VII of the Act of Congress known as " The Civil Rights Act of 1964" as amended, for employment discrimination and retaliation. Judicial review of the involved Merit Systems Protection Board procedures was requested pursuant to Title 5 U.S.C. § 7702, 7703. Additional bases of action include 29 U.S.C.§ 626(c),633a(c) and 29 U.S.C. § 216(b).

Argument

Not withstanding Respondent's admission of " the "divergence of the court of appeals authority", the appropriateness of this case as a vehicle for addressing whether disparate impact claims may be brought under the ADEA is subjected to a three pronged attack.

a. First the raising of the ADEA claim administratively and in the courts below is described as improper. The ADEA is described as creating" two alternative routes for pursuing a claim of age " discrimination. Invoking the Equal Employment Opportunity Commission's administrative process with subsequent resort to the federal courts upon unsatisfactory EEOC performance as to effective remedy is described as one means. The alternative is described as directly bringing a claim in federal court as long as the EEOC has been notified within 180 days of the illegal action. Respondent's position is that petitioner followed neither route "properly."

However petitioner filed administratively via the EEO system for the involved and continuing discrimination. Multiple appeals to and, review by the EEOC were made of such internal administrative process in an effort to exhaust administrative remedy. See Petitioner's initial Petition for Certiorari at APP. EX.4 pages 3-5 of 21 (Administrative and Procedural History section of the Magistrates Recommendation and Report).

" Watts appealed this decision to the EEOC OFO and to the Merit Systems Protection Board ["MSPB"]. On 31 March 2000, the EEOC OFO issued a written decision upholding the Army's finding of no retaliation and no discrimination (Doc. #50, exh. 18). "

Action in the federal courts was initiated on April 14,

2000.(Petitioner's initial Petition for Certiorari at APP. EX.4 pages 5-6 of 21- Judicial Procedural History section Of Magistrates Report and Recommendation). Thus judicial complaint was made within 14 days of the EEOC's last action and the EEOC had been previously notified by prior administrative appeal(s) of final agency decisions at the times such agency indicated via written notice that appeal to the EEOC was the next step.

Discrimination charge adequacy has been established. "Essentially notice of the alleged act it's date and context will suffice" *EEOC v. Shell Oil Co.* ,466 U.S.54, S. Ct. 1621, 80 LED 2d 41.Petitioner's charge and later age discrimination complaint was integral to the other statutory bases of retaliation and race as he was a member of the protected group(s) defined by age also. Thus such basis is integral and included in the summary judgment and appeal as the Eleventh Circuit recognized by it's response. Indeed , respondent defendants waived defense of such basis of complaint (age) and essentially admitted the charges on such basis.

Fed. Rule of Civ. P. 12 (h) (1)states:

"A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in paragraph (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereto permitted by rule 15(a) to be made as a matter of course."

In neither federal district court did respondent make such motions and/or responsive pleadings include the defenses here raised for the first time in opposition to petition for certiorari.

b. The appeals court recognized the basis of complaint(age) and expressly stated that " the disparate impact claim is cognizable only under Title VII," citing *Adams v.Florida Power Corp.* However that court stated that Petitioner's "disparate impact claim" fails because"[petitioner] identifies "no specific practice" that resulted in a disparate result. But the very actions respondent used to justify it's non-consideration for hiring of petitioner functioned as such specific practices. That was the provision of applications and announcements for jobs other than those applied for or that one was known to be qualified for (in this case – pilot in command experience of a helicopter for an aerospace engineer job), continuing denial of the existence of an aerospace engineer job without helicopter pilot in command experience existence even upon congressional inquiry as nearly a dozen such jobs were filled with those not of the protected group(s). Moreover the entire decision process (recruitment and hiring) itself can be considered a specific practice where it can be demonstrated (42 U.S.C. § 2000e-2(k)(1)(A)(i)) that the elements of a respondent's decision making process are not capable of separation for analysis (42 U.S.C. § 2000e-2(k)(1)(B)(i). The decision making process elements here too conveniently appear after the event and upon lawsuit so as to justify actions taken, and are arbitrary. "In particular they are: the claim that no notice of such positions was made unless specifically requested (self- contradicted depending on response currently considered most effective as defense between initial and subsequent Summary judgment opposition responses); the overall operation of the civilian employment recruitment office at Ft. Rucker (Subsequently moved to Ft. Benning and now Redstone Arsenal); provision of improper applications or announcements in contradiction with published notices as this case exemplifies and; continuation of such claims despite repeated requests"- even from petitioner's congressional representative. Petitioners Brief, page 26, APP. EX. 10 Pages 1-6.

Statistical evidence was submitted.(FOIA requests). Demonstrating not one member of the protected class was hired for years while roughly a dozen others were. There can hardly be a greater disparate impact than total exclusion, even absent "statistics", especially where the EEO census of employment (professional) establishes that there are thousands of protected group aerospace engineer degree holders. Even the probability of one known such individual being thus excluded is remote- especially given the disparity in comparative qualification of those typically hired which results in aircraft that are notorious for not being useable as designed and intended (See:Extensive data on the problems of the AH64 in the media-a Fort Rucker Army Aviation tested and "developed"system). Exact statistical methods (which, assisted by increasingly available cheap processing power, give exact probabilities rather than traditional estimates of error) allow the precise determination of the probability of such an outcome as the thesis cited by petitioner to the Appeals court demonstrates. Commercially available exact statistical programs are evaluated in the August 2002, and 2003 issues of American Statistician.

Additional statistical evidence involved the correlation of peaks in disparity (a multiple of the white) of accidental deaths for minorities at the start and end of a prior consent decree resulting from a employment discrimination class action (*Matthews - Hunttington)* 1979/80-86. The relatively recent death of an NAACP official occurred near such region while he was being escorted in excess of the speed limit by government (state) enforcement personnel in a vehicle (Ford SUV) that has been challenged as to it's rollover stability and upon a tire brand (Firestone) involved in an abnormal number of such accidents.

So notorious are the discriminatory activities in such area that academic statistical studies, employing judicial statistical criteria and demonstrating the prevalence of discrimination in such area, are a matter of published record .See: Intentional Job

Discrimination in Metropolitan Areas; Alabama 1999:Blumrosen and Blumrosen. The following URL (internet address) should provide access to a downloadable PDF file of the study or did as of 10/01/03:

http://www.rci.rutgers.edu/~nwklaw/blumrosen/AL1999.pdf

Even the federal district (Middle District of Alabama) which respondent so avidly sought by a successful change of venue effort demonstrates a statistical bias with regards to discrimination suit outcomes. Using the then available Cornell database of federal district court outcomes and, the parameters employment, federal defendant, race, discrimination and plaintiff win rate : Plaintiff win rate was about .06 or 6 out of 100 compared to far greater rates for other districts across the nation- especially where certain minorities are less represented. Such divergence of district and corresponding appellate judicial result is directly affected by the second issue raised as cause for granting the writ: "whether a prima facie case demonstration of failure to hire (or other mode of discrimination) may be arbitrarily limited to a post hiring (or other) model to avoid the demonstration of a prima facie case".

c. Integral to the ADEA disparate impact claim are the means by which the proof of the prima facie case of discrimination and retaliation was denied. To get to the disparate impact issue the second question – whether a prima facie case demonstration of failure to hire may be arbitrarily limited to a post hiring model to avoid a demonstration of a prima facie case- requires a resolution favorable to petitioner. Thus are eliminated those factors which the respondent references as "fact bound " with regards to this court and the primary question.

Although this matter involves hiring, the model invoked by the federal district court for determining the existence of a prima facie case uses that developed for post hiring different treatment.

The fundamental difference is that the pre- hiring demonstration requires only that one apply, be qualified , be denied and that the employer keep seeking applicants of similar qualification. *McDonnell Douglas,* 411 U.S. at 802, 93 sect. at 1824. Whereas the post hiring demonstration requires a demonstration that someone else, whose identity and treatment is wholly in the hands of an employer who adamantly refused any discovery prior to summary judgment , was treated more favorably. That is: provided proper application. Since some dozen or so others were admittedly subsequently hired it would seem that they did receive the proper applications.

Such result- the heart of the prima facie demonstration of refusal to hire- is repeatedly achieved by various means by respondent with respect to petitioner. The district court denied supplemental and amended complaint for later applications that demonstrates continuing such effort and respondent's commitment to lack of equitable treatment in the employment process. Respondent arbitrarily held that automatic provision of applications for subsequent such jobs were only provided upon request and, when it suited their purposes that they were never provided. (summary judgment opposition responses last at R2-55-15) .

Even when their initial evasions were made transparent, respondents blithely created new ones even upon congressional inquiry.(Petitioner's APP. EX. 10 pages 1-6) Clearly the initial provision of the wrong application was continued by failure to provide application for jobs subsequently being offered at the time of such correspondence.

By claiming the clerk answering the "initial" request for the announcement and application was unaware of petitioner's prior protected activity or other factors, respondent ignores such correspondence. But such individual's superiors all admit knowledge of such factors and such clerk is subject to their

orders and hardly an authorized agent of the organization. *Goldsmith v. City of Atmore 996. F.2d 1155, 1162.* Clearly respondent was aware of petitioners prior protected activities and other factors in consideration of prior litigation.

CONCLUSION

For the foregoing reasons, petition for certiorari should be granted. The decision by the involved panel should be reversed. The actual issues raised on appeal should be given full hearing and the underlying decision reversed so that the requested relief is granted.

Respectfully submitted,

_____

Petitioner,
(Plaintiff)
P.O. Box 82202
Atlanta, GA 30354
404-622-3195